

TABLE OF CONTENTS.

I. Statement of the Case	1
II. Brief of Argument	3
The Question Stated	3
Authority of the Adjutant General	4
No Special Form for Commission	7
Decisions Against Deductions	13
Gen. Pershing Authorized to Promote	14
Appendix	17
General Orders #132 W. D.	14
General Orders #78 W. D.	18
General Orders #162 G. H. Q., A. E. F.	21

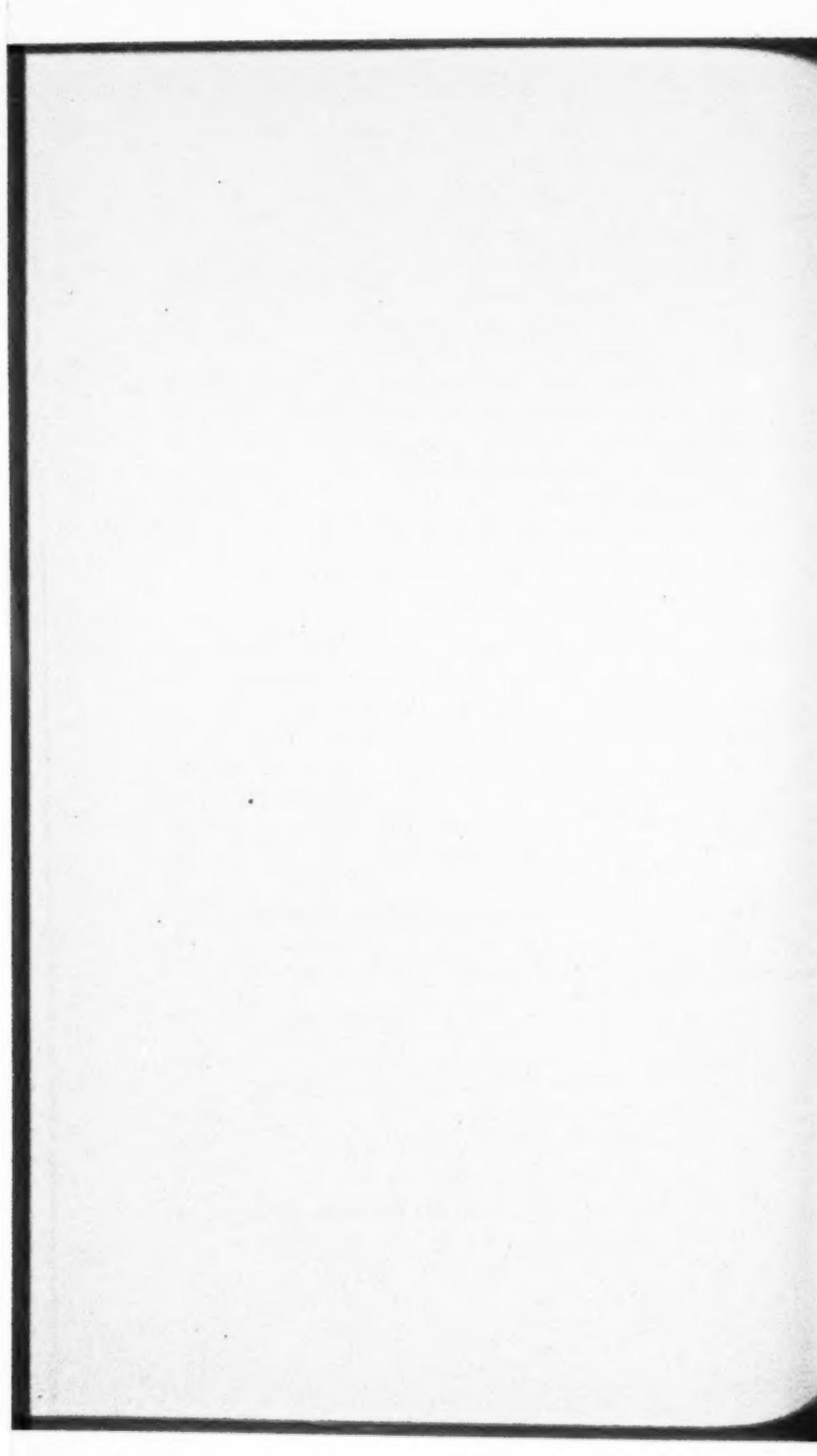
TABLE OF CASES CITED.

Court Cases.

Badeau v. United States, 130 U. S. 439, 452	12
O'Shea v. United States, 28 C. Cls. 392, 400, 401	7
Royer v. U. S. 59 C. Cls. 199 (this case)	2
United States v. Moore, 95 U. S. 760, 763	7

Other Decisions.

17 Comp. Dec. 438, <i>Lynde</i> case	13
17 Comp. Dec. 611, <i>MacArthur</i> case	14
22 Opns. Atty. Gen. 82, 83	6
Digest Opns. Judge Advocates General, 1912, pp. 87, 88	5
Opns. Judge Advocate General, Vol. 2, 1918, p. 96, <i>Wm. H. Callinan</i>	9
Opns. Judge Advocate General, Vol. 2, 1918, p. 1012	10
Opns. Judge Advocate General, Vol. 2, 1918, p. 1046, <i>George P. Guild</i>	9
Army Regulations, 1913, Pars. 21, 774	4
Senate Report #591, 65th Cong. 2d Sess.	8
General Orders, W. D., G. H. Q., A. E. F.	14



Supreme Court of the United States.

October Term 1924.

THE UNITED STATES,
 v. Appellant, } No. 359.
 ELMO R. ROYER. }

Appeal from The Court of Claims.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The facts of this case are stated in detail in the findings (record, pp. 3-6) and are clearly summarized in the first two paragraphs of the opinion of the court (pp. 6, 7):

"The plaintiff in the year 1918 was serving in France as a first lieutenant in the Medical Reserve Corps of the Army of the United States. On August 5, 1918, General Pershing by cable recommended that the plaintiff be promoted to the office of major in the Medical Reserve Corps. On August 22, 1918, the Surgeon General of the Army recommended that the plaintiff be appointed to the office of captain in the Medical Reserve Corps, which recommendation was approved by the Secretary of War. On September 23, 1918, The Adjutant General of the Army cabled General Pershing that the plaintiff had been appointed major Medical Corps. On September 28, 1918, the plaintiff was notified by the chief surgeon of the American Expeditionary Forces that he had been commissioned major, Medical Corps, and the plaintiff was requested to

submit his letter of acceptance and oath of office; the plaintiff accepted the commission and took the oath of office on October 18, 1918, and assumed the insignia of the rank of major, performed the duties of that rank, assumed its responsibilities, and was officially addressed as major. He was paid as a major from October 18, 1918, to date of his discharge August 31, 1919.

"On November 21, 1918, The Adjutant General of the Army stated in an official communication to General Pershing that there was an error in the cablegram appointing plaintiff as major, and that his appointment was as captain only. On December 17, 1918, it was ordered by competent authority that the plaintiff assume his proper rank and make proper adjustment of pay overdrawn. By an order of February 17, 1919, the plaintiff was again promoted to the rank of major. The plaintiff was not informed until February 19, 1919, that there had been a mistake in his first appointment as major. He was paid by the pay officers as major during his entire service from October 18, 1918, to the date of his discharge on August 31, 1919. At that time there was checked against him and deducted from his pay the sum of \$240.19 as having been overpaid him from October 18, 1918, to February 16, 1919, in the rank of major over and above the pay of a captain."

The court held that as the claimant discharged the duties of the office, assumed its responsibilities, rendered service to the Government as an officer of the rank of major, and was paid for his services in good faith by the officers having charge of the payment as a major, he should not have been required to return the money so received to the Government.

These conclusions are clearly stated in the opinion of the court by Judge Hay (record, pp. 6-9). Judge Downey delivered a dissenting opinion (rec. pp. 9-11). The case is reported 59 C. Cls. 199.

Judgment was entered for the amount originally

paid him as major, \$240.19 (p. 11). The United States appealed (pp. 11, 12).

BRIEF OF ARGUMENT.

THE QUESTION STATED.

The defense raised by this appeal is an attempt to punish an officer of the Army for what is claimed to have been a mistake in promoting him to the grade of major when it was intended only to make his a captain.

General Pershing, commanding the American Expeditionary Forces in France, sent a cable August 5, 1918, to the Chief of Staff of the Army recommending the promotion of this officer, then a First Lieutenant in the Medical Reserve Corps, to be a Major in that corps. Six weeks later, September 23, 1918, a cablegram was sent by The Adjutant General to Gen. Pershing giving official information that First Lieutenant Royer had been appointed a major. The Chief Surgeon of the American Expeditionary Forces thereupon promptly notified the officer. The officer promptly accepted the appointment and executed the oath of office. He assumed the insignia of rank of major, performed the duties appropriate to that rank and was so officially addressed.

Not until February 19, 1919, four months later, was the officer informed that any mistake was claimed to have existed in his appointment of September 23, 1918, and then only in connection with a new promotion to major.

He served until August 31, 1919. Shortly before that time he applied for a discharge in view of the cessation of active warfare. He was informed that he would not be permitted to take advantage of a leave of absence for purpose of discharge until he had made

proper settlement of the claim of the Government; that he had been paid as major prior to February, 1919, instead of being paid as captain for that period, and that he must restore the difference between the pay of captain and the pay of major, amounting to \$240.19. There was accordingly deducted from the amount due him the said sum of \$240.19, and this amount has never been restored or repaid to him (Finding VI, rec. p. 6).

AUTHORITY OF THE ADJUTANT GENERAL.

The notification of appointment given to General Pershing and by him, through proper military channels, communicated to this officer was from the Adjutant General of the Army.

The defense necessarily attacks the authoritative character of this notification. To sustain that position would be to impeach the authority of the Adjutant General under the law and Army Regulations.

The Adjutant General is the head of a staff corps of the Army (acts of June 3, 1916, sec. 6, 39 Stat. 169; June 4, 1920, c. sec. 6, 41 Stat. 765).

By the Army Regulations of 1913, Par. 774: "The Adjutant General's Department is the department of records, orders, and correspondence of the Army and the militia."

By Par. 21: "Notices of appointments and promotions are issued by the War Department through the Adjutant General of the Army."

The act of June 4, 1920, c. 227, Sec. 6 (41 Stat. 759, 765) gave statutory sanction to these provisions of the regulations; but they were in force as regulations before it.

Thus by the Army Regulations the only valid evidence of an appointment or promotion in the Army is by notice from the Adjutant General.

The following authoritative definition of the duties of this office is given in *Digest Opinions Judge Advocates General, 1912*, pp. 87, 88:

"I. G 3 a (2). It is an essential incident of departmental administration that there should be some office in which the action of the Secretary of War, in respect to the duty to which officers of the Army are assigned, shall be made a matter of official record; and that office should also be charged with the preparation and submission to the Secretary of War of orders changing the station of officers or appointing them to particular duties. The Adjutant General, from the nature of his office, constitutes the channel of communication between the heads of departments and the Secretary of War in such cases, and in his office the record of the action of the Secretary thereon is made a matter of permanent record."

The notice then of the appointment of the claimant as major contained in the cablegram signed by the Adjutant General and sent September 23, 1918, was the only possible valid notice of appointment. To attack that cablegram as evidence of an appointment to office is to impeach the whole authority of the Adjutant General as the proper organ of the announcement of all orders for appointment and promotion in the Army.

It was evidently so viewed not only at the time but after the whole question of the alleged mistake had arisen, not only by the Adjutant General but by the Secretary of War.

In a communication addressed by the Adjutant General's Office under date of March 3, 1919, it is certified "The records of this office show that Major Elmo R. Royer, Medical Corps, was appointed as such

September 23, 1918, per cable to General Pershing." (Record, foot p. 5; top 6.)

This very case shows the authority attached by the officers of the War Department and of the Department of Justice alike to the attesting authority of the Adjutant General. The evidence that a mistake was made in the original promotion of September 23, 1918, as well as that this officer was regularly promoted to major February 19, 1919, is precisely the same as that for the original promotion, to wit, the certification of the Adjutant General (Finding III, p. 4).

September 23, 1918, the Adjutant General cabled General Pershing of the promotion to major (Finding III, p. 4) and the Chief Surgeon A. E. F. notified the officer thereof.

November 21, 1918, the Adjutant General cabled General Pershing that the promotion to major was a mistake and that claimant was really a captain only (Finding IV, p. 4).

February 19, 1919, the Chief Surgeon of the American Expeditionary Forces in France notified the officer that he had then been promoted from captain to major (end Finding IV, middle p. 5).

March 3, 1919, the Adjutant General in the face of this alleged discovery of error in the previous appointment officially stated that the records of his office showed that this officer had been appointed a major September 23, 1918, per cable to General Pershing (Finding V, foot p. 5 and top p. 6).

The only possible reconciliation of all these discrepancies is to accept the first notification of the Adjutant General as an authentic statement of the action of the War Department.

NO SPECIAL FORM FOR COMMISSION.

In *United States v. Moore*, 95 U. S. 760, it was held that a notice by the Secretary of the Navy to an assistant surgeon that he would be regarded from the date of the letter as a passed assistant surgeon was a valid and sufficient appointment to that office. The court said (p. 736): "The place has every ingredient of an office, and, as we have seen, the appellee was legally appointed to it."

In *O'Shea v. United States*, 28 C. Cls. 392, a letter of the Secretary of War "You are hereby informed that the President of the United States has appointed you post chaplain in the service of the United States," etc., was recognized as a legal and sufficient commission.

The court said (p. 400):—

"Section 1794 of the Revised Statutes provides, in substance, that the Secretary of State shall keep the great seal, 'and shall affix the same to all civil commissions for officers of the United States to be appointed by the President, by and with the advice and consent of the Senate, or by the President alone;' and further provides that the seal shall not be affixed to any commission before the same has been signed by the President. It will be noted that this provision of law is expressly confined to 'civil' commissions for officers of the United States, thus by legal inference excluding 'military' commissions."

and also (p. 401):—

"This appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made. (*Wilcox v. Jackson*, 1 Peters, 498, 513; *United States v. Eliason*, 16 Pet. 201, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States v. Farden*, 99 U.

S. 10, 19; *Wolsey v. Chapman*, 101 U. S. 755, 769.) In our opinion the communication of November 21, with the acceptance and oath filed, made plaintiff a post chaplain during the next session of the Senate, unless some other person should be nominated to the Senate and with that body's advice and consent commissioned in his place. This did occur, but not until March, 1888."

So, here, the act of the Adjutant General, the official organ of communication to all officers of the Army was conclusive evidence that the appointment had been made. Surely the officer himself was not only warranted in acting under the appointment, but was bound to do so.

The practice prevailing throughout the Army during the war exigency of making a notice from the only proper official source serve the purpose of a commission was referred to in a report of the Committee on Military Affairs by Mr. McKellar (Senate Report #591, 65th Cong. 2d Sess. dated October 14, 1918):—

"Under the terms of a proviso in paragraph 3 of section 1, of the Army act of May 18, 1917 (C. 15, 40 Stat. 76), it was provided that the President alone (which of course means the heads of the departments) may appoint officers less than the grade of colonel. At that time the Army was small, the number of officers totally inadequate, and it was necessary that the official Military Establishment be immediately increased in an unprecedented manner. It was realized that mistakes might be made in some instances, but it was so essential that the officers should be secured at the earliest practicable moment that Congress believed that the duty of selecting these inferior officers could well be left to the initial appointing power without the requirement that the appointees should receive the sanction of the Senate."

The Attorney General, in 22 Opinions, 82, stated

that there was nothing to require the signature of the President to commissions of officers in the Navy, saying (p. 83): "The appointments provided for by this legislation are not such as by the Constitution are required to be made in any particular way."

In Opinions Judge Advocate General, Vol. 2, 1918, p. 96, in an opinion of February 12, 1918, it appears that a Lieutenant William H. Callinan upon the same day of his accepting a commission as First Lieutenant in the Engineer Officers' Reserve Corps, August 27, 1917, in time of war, received a telegram from the Adjutant General's Office addressed to Second Lieutenant Joseph B. *Callahan* at the same address, stating:

"You are placed on active duty effective September second and will proceed to Fort Leavenworth, Kansas."

Believing that this telegram was intended for him, he proceeded to Fort Leavenworth and reported for duty. He so remained for several weeks. Then the mistake was discovered by the War Department. It was held that the Adjutant General's letter, though not intended for Lieut. Callinan, was one that he as subject to such orders was required to obey. It was said:

"An officer of the Army must not stop upon the receipt of an order to quibble about mistakes in his name. If the order purports to be for him by reason of the place and circumstances of its receipt and is one which he is qualified to obey, he should obey it. Accordingly, Lieut. Callinan is entitled to mileage and pay incident to compliance with such order."

A subsequent opinion of December 7, 1918, in the same volume (p. 1046), presents the case of a retired captain detailed to active duty and appointed by temporary commission a major, which appointment he

accepted. Later he was informed by the Adjutant General's Office that the appointment to the grade of major was due to an oversight in the office of the Adjutant General and was advised that his proper rank was that of captain. The Judge Advocate General said:

"In the opinion of this office, Capt. George R. Guild, United States Army, retired, is now, and has been since November 5, 1917, a temporary major of Infantry, with rank from August 5, 1917.

Later on it is said:

"As soon as the appointing power acted in this case, the office vested in Capt. Guild, subject to his acceptance, which on November 5, 1917, completely vested the office in him."

Perhaps the case which comes nearest the present in the published reports of the Judge Advocates General is one of November 23, 1918, reported in the same volume, page 1012, here quoted in full on account of its close application.

"On December 19, 1917, The Adjutant General wired the commanding officer of a disciplinary barracks announcing the appointment of a sergeant as first lieutenant, United States Guards, National Army. At that time the appointee was not a sergeant and was not stationed at that place, but was a second lieutenant, Signal Corps, stationed at Kelly Field, Texas. These facts were communicated by the commanding officer to The Adjutant General and to the soldier. On December 24, The Adjutant General wired the commanding officer withdrawing the appointment, and on December 25 the soldier forwarded to The Adjutant General an oath of office as first lieutenant, United States Guards. The attempted withdrawal by The Adjutant General was ineffective, because an appoint-

ment once made can not be withdrawn until it is expressly or constructively refused by the appointee. The forwarding of the oath of office constituted an acceptance, and since that date the status of the soldier has been that of first lieutenant. (Mechem, Public Offices, secs. 113-115; Dig. Ops. J. A. G. 1912, p. 801; C. 16,732.)
210:14.

"War Department, J. A. G. O., November 23, 1918.
"To the Adjutant General.

"1. It appears from the papers in reference that on November 12, 1917, S., then a first sergeant, was tendered a commission as second lieutenant in the Signal Corps, which commission he accepted November 22, 1917: that on December 19, 1917, The Adjutant General wired the commanding officer, Disciplinary Barracks, Alcatraz Island, announcing that Sergt. S. was thereby appointed first lieutenant, United States Guards, National Army, and directing him to instruct said S. to wire acceptance, and upon acceptance, to report to the commanding general, Western Department by wire for instructions: that at this time S. was performing the functions of second lieutenant, Signal Corps, at Kelly Field: that the commanding officer, Disciplinary Barracks, telegraphed to the commanding officer at Kelly Field the information contained in the telegram of December 19 of The Adjutant General, and telegraphed The Adjutant General that S. was then a second lieutenant, Signal Corps, at Kelly Field; that S. learned indirectly of the appointment, and on December 25, 1917, forwarded to The Adjutant General an oath of office as first lieutenant, United States Guards; and that on December 24, 1917, The Adjutant General wired the commanding officer, Disciplinary Barracks, Alcatraz Island, withdrawing the appointment of S. as first lieutenant, United States Guards. It does not appear that notice of this withdrawal was ever given to S. Inquiry is made as to the status of S.

"2. S. is, and has been since December 25, 1917, a first lieutenant, United States Guards, United States

Army. The appointment to that office was complete without S's acceptance, and until S expressly or constructively refused the appointment it could not be withdrawn. (Mechem on Public Offices, secs. 113-115.) The fact that the communication to S. of the appointment was not made directly is entirely immaterial. (Dig. Ops. J. A. G. 1912, p. 801; C. 16732.) As soon as he forwarded his oath of office, which constituted an acceptance, he became fully invested with the office."

A DE FACTO OFFICER AT LEAST.

But, even if this officer was not legally appointed a major, Medical Corps, by the cablegram from the Adjutant General, he was at the very least a *de facto* officer discharging the duties of the office. That cablegram was accepted by General Pershing, Commander in Chief of the American Expeditionary Forces, by the Chief Surgeon of said Forces (top p. 14), and by the claimant himself, as a legal appointment to the grade of major. He was never notified of anything else until after the end of the period covered by this claim. He wore the insignia and was recognized and performed all the duties of that rank.

In *Badeau v. United States*, 130 U. S. 439, this court held (last paragraph of syllabus):

"An officer whose name is placed on the retired list of the Army by the Secretary of War, in apparent compliance with provisions of law, is an officer *de facto* if not *de jure*, and money paid to him as salary can not be recovered back by the United States."

The court said (p. 452):

"Nor can we disturb the judgment adverse to the counterclaim. As between individuals, where money has been paid under a mistake of law, it can not be recovered back, but it is denied that this rule is applicable

to the United States, upon the ground that the Government is not bound by the mistakes of its officers, whether of law or of fact. *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Bank of Metropolis*, 15 Pet. 377; *McElrath v. United States*, 101 U. S. 426.

"But inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex aequo et bono*, he ought to return."

This *Badeau* case, in part quoted in the opinion of the Court of Claims (top p. 9), as well as the four other cases quoted in the opinion of that court (last half p. 8), are alone conclusive of the right of an Army officer to retain compensation once paid to and received by him for services performed in good faith.

It is true that this suit is in form against the United States for the recovery of money. In substance, it is rather a defensive proceeding. It is to recover a deduction improperly made from pay fully accruing to the officer at the end of his service in the rank of major, after a new appointment unquestioned in form.

DECISIONS AGAINST DEDUCTIONS.

In the *Lynde* case, 17 Comp. Dec. 438, an officer was borne on the retired list of the Army for a number of years under a Presidential restoration held by the Comptroller not to have been valid. There was a full review of all Court of Claims and Supreme Court decisions above cited. In accordance therewith it was held that pay received by the officer in the belief that he was lawfully on the retired list, and though rendering no active duty, subject to the disqualification of all such officers, could not be set off against an independent claim of his for pay while on the active list. It was said, "The pay that a *de facto* officer has received for service

rendered can not be used as a stoppage against pay due him as an officer *de jure*."

Still closer in circumstances to this case is that of *MacArthur*, 17 Comp. Dec. 611, where a lieutenant in the Navy was irregularly promoted to lieutenant commander. It was held (p. 615) that his promotion "had the effect to make him a *de facto* lieutenant commander from the date he received notice of his commission as such and entered upon duty thereunder, although his promotion to said office was thereafter set aside because irregular and because another officer had a prior legal right to said promotion. He could not have been a lieutenant commander in fact before he had notice that he had been commissioned as such. It appears that upon receiving notice on February 2, 1909, that he had been commissioned a lieutenant commander he served under said commission as lieutenant commander until February 24, 1909, and was paid as such officer for said period. For said service so rendered I do not think said pay can now be recovered back."

These decisions apply in every respect to the present case.

GENERAL PERSHING AUTHORIZED TO PROMOTE.

Reference is made in the brief for the United States (p. 13) to certain General Orders. The material portions of those orders are annexed as an appendix to this brief.

By General Orders #132, War Department, October 10, 1917 (*post*, p. 17) it is provided under the heading "Staff Officers":

"When a vacancy exists in a staff corps or department within the territorial limits of the United States in a grade above the lowest commissioned grade authorized by law, such vacancy shall be filled by promotion

or assignment on recommendation of the chief of the bureau. When such vacancy exists in a staff corps or department in an expeditionary force, the vacancy will be filled upon the recommendation of the commanding general of the expeditionary force in which the vacancy occurs; and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department."

By General Orders #78, War Department, August 22, 1918, (*post*, p. 18):—

"Commanding Generals of expeditionary forces serving abroad are authorized, pending the approval of the War Department, to fill all vacancies in their command below the grade of general officer."

As to staff officers it is specially provided by the same orders—

"and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department."

By General Orders #162, General Headquarters, American Expeditionary Forces, France, September 24, 1918, (*post*, p. 21) the term "vacancy" is defined. It is specially provided under the heading "The Authority by whom Promotions are made":

"1. Pending the approval of the War Department, the Commander in Chief will, by temporary appointment, make promotions to fill all vacancies below the grade of Brigadier General in the A. E. F.

"2. In the case of a recommendation for the promotion of an officer for whom no vacancy exists, such recommendation, if approved by the Commander in Chief, will be forwarded to the War Department."

Under these provisions General Pershing was vested with ample authority to fill these vacancies even had he not had the statement of the Adjutant General, which he was bound to accept as absolute verity.

There was no limit at this time on the numbers of the Officers' Reserve Corps in service in the several grades. That corps was provided for by the act of June 3, 1916 (c. 134, 39 Stat. 166). Sec. 37 (p. 189) authorized the President alone to appoint and commission reserve officers in all grades up to and including that of major.

Sec. 38 (p. 190) entitled "The Officers' Reserve Corps in War" authorized all officers of the Reserve Corps to be ordered to temporary duty with the Regular Army and provided:

"While such reserve officers are on such service they shall, by virtue of their commissions as reserve officers, exercise command appropriate to their grade and rank in the organizations to which they may be assigned, and shall be entitled to the pay and allowances of the corresponding grades in the Regular Army, with increase of pay for length of active service as allowed by law for officers of the Regular Army, from the date upon which they shall be required by the terms of their orders to obey the same."

The judgment should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,

Attorneys for Appellee.

APPENDIX

General Orders
No. 132.

WAR DEPARTMENT,
Washington, October 10, 1917.

By direction of the President the following regulations governing, for the duration of the war, the appointment and promotion of officers of the National Army and the National Guard are published for the information and guidance of all concerned:

1. The commanding generals of National Guard or National Army divisions serving within the limits of the United States or its possessions will submit recommendations to The Adjutant General of the Army as to promotions and appointments to fill vacancies in organizations forming part of their divisions.

Temporary appointments and promotions in their commands to all grades below that of general officer may, subject to the approval of the War Department, be made by division commanders when serving beyond the limits of the United States, to vacancies occurring within their divisions, provided that, when the division forms part of an army corps, the corps commander shall make the temporary appointments upon the recommendation of the division commander.

At home or abroad, officers rendered surplus by the consolidation of units may be assigned by division commanders to vacancies existing in their grade and arm of service.

2. * * * * *

3. All officers belonging to regiments, separate units, brigades, and divisions of the National Army or National Guard, whether members of the Regular Army, National Army, or National Guard, are equally eligible for selection in accordance with the provisions of these regulations, and recommendation for appointment or promotion must be based solely on demonstrated fitness and capacity without regard to seniority.

LINE OFFICERS EXCEPT THOSE OF COAST ARTILLERY.

* * * * *

COAST ARTILLERY.

* * * * *

STAFF OFFICERS.

9. When a vacancy exists in a staff corps or department within the territorial limits of the United States in a grade above the lowest commissioned grade authorized by law, such vacancy shall be filled by promotion or assignment on recommendation of the chief of the bureau. When such vacancy exists in a staff corps or department in an expeditionary force, the vacancy will be filled upon the recommendation of the commanding general of the expeditionary force in which the vacancy occurs, and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department.

Vacancies in the lowest grade of each staff corps or department will be filled in accordance with law upon the recommendation of the chief of such staff corps or department.

OFFICERS ON DETACHED SERVICE.

* * * * *

TERMINATION OF TEMPORARY APPOINTMENTS.

* * * * *

EXAMINATIONS.

* * * * *

BY ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,

General, Chief of Staff.

Official:

H. P. McCAIN,

The Adjutant General.

General Orders

No. 78.

WAR DEPARTMENT,

Washington, August 22, 1918.

By direction of the President, General Orders, No.

132, War Department, 1917, is rescinded and the following reservations, governing for the duration of the war the appointment and promotion of officers of the Army, are published for the information and guidance of all concerned:

1. *Vacancies—how filled.* Training schools will be maintained to prepare selected non-commissioned officers and privates for commissions.

Vacancies in the grade of second lieutenant in a regiment or separate unit will be filled, in so far as practicable, by the appointment of candidates from the unit who have passed through these schools. In exceptional cases, for gallantry in action and demonstrated fitness, enlisted men may be appointed second lieutenants though not graduates of the training schools.

Vacancies in the grade of second lieutenant not filled in the foregoing manner will be filled by transfer or assignment.

Vacancies in grades below that of lieutenant colonel and above that of second lieutenant in any regiment or separate unit will be filled, so far as practicable, by the promotion of officers selected from the next lower grade in the regiment or separate unit in which the vacancy occurs. In case of necessity the selection may be made from officers of the next lower grade in the same arm or corps within the division.

Vacancies in the grade of colonel and lieutenant colonel will be filled, as far as practicable, by selection from officers in the next lower grade in the same arm of the service, in the division to which the organization in which the vacancy occurs is assigned or attached for service.

Vacancies in any commissioned grade within a division may be filled by transfer of officers of the same grade and arm or corps of the service by competent authority, when the interests of the service demand such action.

2. *Recommendations for appointment.*—A personnel board will be organized in each separate unit and regiment or higher unit. The board will be appointed by the unit commander to recommend to him details,

assignments, and appointments of officers. The board will be permanent but the members thereof will be changed so that no member will serve continuously more than three months, and having served three months he will not serve again until the expiration of three months.

Recommendations for appointment must be based solely on demonstrated fitness and capacity, without regard to seniority, except that selections will ordinarily be made from the next lower grade.

In the United States and its possessions commanding generals of divisions and of separate units will submit recommendations to The Adjutant General of the Army to fill vacancies in organizations forming part of their command.

While serving in expeditionary forces similar recommendations will be made to the commanding general of the expeditionary forces. Commanding generals of expeditionary forces serving abroad are authorized, pending the approval of the War Department, to fill all vacancies in their command below the grade of general officer.

3. Coast Artillery * * *

4. *Staff Officers.*—When a vacancy exists in a staff corps or department within the territorial limits of the United States in a grade above the lowest commissioned grade authorized by law, such vacancy shall be filled by promotion or assignment on recommendation of the chief of the bureau. When such vacancy exists in a staff corps or department in an expeditionary force, the vacancy will be filled upon the recommendation of the commanding general of the expeditionary force in which the vacancy occurs; and the commander of such expeditionary force may fill such vacancies by temporary appointments or by assignments, subject to the approval of the War Department.

Appointments and promotions in the staff corps, as well as in the line, will be made solely to obtain efficiency. The policy of the War Department is, however, that only for exceptional merit will staff officers

be advanced in grade above meritorious contemporaries in the line.

5. Officers not covered by the above paragraphs.

* * * * *

6. All promotions and appointments made as herein prescribed will be subject to examination as to physical fitness.

(210.2, A.G.O.)

By order of the Secretary of War:

PEYTON C. MARCH,

General, Chief of Staff.

Official:

P. C. HARRIS,

Acting The Adjutant General.

G. H. Q.

AMERICAN EXPEDITIONARY FORCES,

General Orders }
No. 162. }

France, Sept. 24, 1918.

1. In order to put the provisions of G. O. No. 78 W.D. August 22, 1918, into operation in this command, G. O. No. 124 and Sec. 1, G. O. No. 144 c.s. these headquarters are rescinded, and the following rules governing the recommendation of officers of this command for promotion to the grade of colonel, inclusive, or the promotion itself, where the same is within the authority of the Commander-in-Chief, are published for the information and guidance of all concerned.

1. *Vacancies.*—Within the meaning of this order the term "Vacancy" means that there is a position authorized by the War Department and that this position is either unoccupied or is occupied by an officer of a grade lower than the grade authorized by the War Department. This position is authorized by the War Department in one of two ways:

First, By the approval of a table of organization.

Second, By a statement that certain classes of officers

may consist of a definite number in each of several grades, or that authority is granted for the officers in those grades to occupy the several grades according to a prescribed proportion or percentage.

There is, then, a vacancy when a position in the table of organization is not occupied by carrying on the rolls of the organization an officer of a grade as high as that authorized; or when a grade is not occupied by the entire number authorized under an allowance which authorizes a definite number in the various grades, or, in lieu thereof, a certain proportion or percentage.

2. Among officers serving in positions not covered by tables of organization authorized by the War Department, or by an allowance from the War Department of fixed numbers or percentages for the various grades, recommendations will conform to the principle that the proportion of officers of any arm, or staff corps, department or service, shall not exceed the proportion authorized by statute for the same grade in the corresponding arm, or staff corps, department or service; except that the number commissioned in the lowest authorized grade in any arm, staff corps, department or service (not limited as to number of officers) shall not be limited. Where there is no corresponding arm, or staff corps, department or service authorized by statute for the Regular Army, the proportion will be the same as for the Engineer Corps. For the purpose of determining these percentages the entire A. E. F. will not be taken as a unit; but each army will constitute a unit, the S. O. S. will constitute a unit, and the remaining officers of this class in the A. E. F. will constitute the remaining unit.

II. The Authority by Whom Promotions are Made.—

1. Pending the approval of the War Department, the Commander-in-Chief will, by temporary appointment, make promotions to fill all vacancies below the grade of Brigadier General in the A. E. F.

2. In the case of a recommendation for the promotion of an officer for whom no vacancy exists, such recom-

mendation, if approved by the Commander-in-Chief,
will be forwarded to the War Department.

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By Command of GENERAL PERSHING.

JAMES W. MCANDREW,

Chief of Staff.

Official:

ROBERT C. DAVIS,
Adjutant General.